

Status: Low Implementation – High Confusion

In a letter to Secretary Thompson on September 27, the Subcommittee on Privacy and Confidentiality of the NCVHS reported the results of their hearings in Boston on September 10 and 11, 2002 and their concerns about what they heard. "The testimony of 28 witnesses from throughout New England afforded the Subcommittee an opportunity to learn about the level of implementation activities by a variety of covered entities. Although additional hearings are scheduled in late October and early November in Baltimore and Salt Lake City, **the NCVHS was so troubled by the Boston testimony that we are sending you our initial findings and recommendations.** We anticipate sending you additional recommendations after our hearings have been completed in November.

"The witnesses at the Boston hearing expressed widespread support for the goals of the Privacy Rule... Some providers, especially larger ones, reported making substantial progress toward compliance. There was also praise for the guidance provided by the Office for Civil Rights (OCR) in July 2001.

"Overall, however, the NCVHS **was both surprised and disturbed at the generally low level of implementation activities and the high levels of confusion and frustration.** Some covered entities decided to wait until the final Privacy Rule amendments were published in August 2002, and only now are beginning to contemplate their compliance duties. While some professional societies and other groups have made laudable efforts to educate their members, **many physicians, dentists, and other health care providers, especially those in small towns and rural areas, have never heard of HIPAA, do not think it applies to them, or confuse their obligations under the Privacy Rule with their duties regarding standards and security and claims attachments. State and local governments reported lacking the budget or personnel to draft their own HIPAA documents and design training programs to comply with the Privacy Rule.** The failure of the OCR to make available sample forms, model language, and practical guidance has left covered entities at the mercy of an army of vendors and consultants, some of whose expertise appears limited to misinformation, baseless guarantees, and scare tactics.

"The unprecedented scope of the Privacy Rule raises the likelihood of widespread disruption of the health care system as we approach the April 14, 2003, compliance date. For example, tens of millions of acknowledgment of privacy notices will need to be signed, including by patients picking up prescriptions at retail pharmacies. Public health agencies at all levels have indicated that some providers and hospitals already are failing to report essential public health information because of the erroneous belief that it is prohibited by HIPAA. Representatives of public health clinics told the Subcommittee that they lack the resources to translate essential notices into the numerous languages spoken by their patients as well as to provide the necessary training to employees with low education levels and minimal fluency in English. Home health care providers said they are unsure how to protect the confidentiality of protected health information when it is stored in the homes of their patients. Large employers with self-funded employee benefit plans have received no guidance on when their benefits-related activities are subject to the Privacy Rule. Furthermore, nobody seems to know whether HIPAA or state law applies in the numerous instances in which the laws conflict.

"The NCVHS very much appreciates OCR Director Campanelli's appearance at our meeting on September 25, 2002. We think that new initiatives being developed by OCR in education and technical assistance are steps in the right direction. However, there must be a dramatic increase in the breadth, depth, and scale of implementation activities, and there must be a greater sense of urgency to the Department's efforts. Unless prompt, vigorous action is taken to ensure that the implementation goes smoothly, the public acceptance and viability of the entire Privacy Rule will be threatened."

+ More at: <http://ncvhs.hhs.gov/020927lt.htm>

The National Committee on Vital and Health Statistics (NCVHS) serves as the statutory [\[42 U.S.C. 242k\(k\)\]](#) public advisory body to the Secretary of Health and Human Services in the area of health data and statistics. In that capacity, the Committee provides advice and assistance to the Department and serves as a forum for interaction with interested private sector groups on a variety of key health data issues.

+ More at: <http://ncvhs.hhs.gov/>

Enforcement

"HHS Secretary Tommy G. Thompson announced ... that the Centers for Medicare & Medicaid Services (CMS) will be responsible for enforcing the HIPAA transaction and code set standards. Ruben J. King-Shaw Jr., CMS deputy administrator and chief operating officer, said CMS will create a new office to bring together its responsibilities under HIPAA, including enforcement.

"Concentrating these CMS responsibilities in a new office with a single mission will give us the most efficient operation possible, while providing strong support for all our partners in the health care community," King-Shaw said.

"Enforcement activities will focus on obtaining voluntary compliance through technical assistance. The process will be primarily complaint driven and will consist of progressive steps that will provide opportunities to demonstrate compliance or submit a corrective action plan."

This suggests to us that covered entities that will not be compliant would be well advised to be able to demonstrate good faith in what has been accomplished and a well thought out plan to become fully compliant.

+ More at: <http://www.hipaadvisory.com/news/2002/1015cms.htm>

FAQ About the HIPAA Privacy Rule

We and our clients have a number of recurring questions. The FAQs published by the Office of Civil Rights on October 8, 2002, responded to a number of those questions. Here are the ones we found of particular interest; there are more at the URL below.

- A provider might have a patient's medical record that contains older portions of a medical record that were created by another/previous provider. Will the Privacy Rule permit a provider who is a covered entity to disclose a complete medical record even though portions of the record were created by other providers?

Response: Yes, the Privacy Rule permits a provider who is a covered entity to disclose a complete medical record including portions that were created by another provider, assuming that the disclosure is for a purpose permitted by the Privacy Rule, such as treatment.

- Can a physician's office FAX patient medical information to another physician's office?

Response: The Privacy Rule permits physicians to disclose protected health information to another health care provider for treatment purposes. This can be done by fax or by other means. Covered entities must have in place reasonable and appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information that is disclosed using a fax machine. Examples of measures that could be reasonable and appropriate in such a situation include the sender confirming that the fax number to be used is in fact the correct one for the other physician's office, and placing the fax machine in a secure location to prevent unauthorized access to the information. See 45 C.F.R. § 164.530(c).

- A clinic customarily places patient charts in the plastic box outside an exam room. It does not want the record left unattended with the patient, and physicians want the record close by for fast review right before they walk into the exam room. Will the Privacy Rule allow the clinic to continue this practice?

Response: Yes, the HIPAA Privacy Rule permits this practice as long as the clinic takes reasonable and appropriate measures to protect the patient's privacy. The physician or other health care professionals use the patient charts for treatment purposes. Incidental disclosures to others that might occur as a result of the charts being left in the box are permitted, if the minimum necessary and reasonable safeguards requirements are met. As the purpose of leaving the chart in the box is to provide the physician with access to the medical information relevant to the examination, the minimum necessary requirement would be satisfied. Examples of measures that could be reasonable and appropriate to safeguard the patient chart in such a situation would be limiting access to certain areas, ensuring that the area is supervised, escorting non-employees in the area, or placing the patient chart in the box with the front cover facing the wall rather than having protected health information about the patient visible to anyone who walks by. Each covered entity must evaluate what measures are reasonable and appropriate in its environment. Covered entities may tailor measures to their particular circumstances. See 45 C.F.R. §164.530(c).

· A hospital customarily displays patients' names next to the door of the hospital rooms that they occupy. Will the Privacy Rule allow the hospital to continue this practice?

Response: The Privacy Rule explicitly permits certain incidental disclosures that occur as a by-product of an otherwise permitted disclosure—for example, the disclosure to other patients in a waiting room of the identity of the person whose name is called. In this case, disclosure of patient names by posting on the wall is permitted by the Privacy Rule, if the use or disclosure is for treatment (for example, to ensure that patient care is provided to the correct individual) or health care operations purposes (for example, as a service for patients and their families). The disclosure of such information to other persons (such as other visitors) that will likely also occur due to the posting is an “incidental” disclosure.

· Is a physician required to have business associate contracts with technicians such as plumbers, electricians or photocopy machine repairmen who provide repair services in a physician's office?

Response: No, plumbers, electricians and photocopy repair technicians do not require access to protected health information to perform their services for a physician's office, so they do not meet the definition of a business associate. Under the Privacy Rule, “business associates” are contractors or other non-workforce members hired to do the work of, or for, a covered entity that involves the use or disclosure of protected health information. See 45 C.F.R § 160.501.

· Are janitorial services business associates?

Response: Generally, janitorial services that clean the facilities of a covered entity (i.e., a health care provider, health plan or health care clearinghouse) are not business associates because the work they perform for covered entities does not involve the use or disclosure of protected health information, and any disclosure of protected health information to janitorial personnel that occurs in the performance of their duties (such as may occur while emptying trash cans) is limited in nature, occurs as a by-product of their janitorial duties, and could not be reasonably prevented. Such disclosures are incidental and permitted by the Privacy Rule. See 45 C.F.R. § 164.502(a)(1).

If a service is hired to do work for a covered entity where disclosure of protected health information is not limited in nature (such as routine handling of records or shredding of documents containing protected health information), it likely would be a business associate. However, when such work is performed under the direct control of the covered entity (e.g., on the covered entity's premises), the Privacy Rule permits the covered entity to treat the service as part of its workforce, and the covered entity need not enter into a business associate contract with the service. See 65 Fed. Reg. 82462, 82480 (December 28, 2000).

· Are the following entities considered “business associates” under the Privacy Rule: US Postal Service, United Parcel Service, delivery truck line employees and/or their management?

Response: No, the Privacy Rule does not require a covered entity to enter into business associate contracts with organizations, such as the US Postal Service, certain private couriers and their electronic equivalents that act merely as conduits for protected health information. A conduit transports information but does not access it other than on a random or infrequent basis as necessary for the performance of the transportation service or as required by law. Since no disclosure is intended by the covered entity and the probability of exposure of any particular protected health information to a conduit is very small, a conduit is not a business associate of the covered entity. See 65 Fed. Reg. 82462, 82476 (December 28, 2000).

+ More at <http://www.hhs.gov/ocr/faqs1001.doc>

Security: Handling a workstation after an employee leaves

The following is based on general guidance but certainly applies to HIPAA. “For various reasons, employees may be terminated or they may choose to end their employment. In either case, it is important that your organization have an established security policy and procedure in place to manage the situation and minimize the security risks associated with exiting personnel.

- Disable network account
- Collect all security IDs, proximity devices, access badges, smart cards and any other identification, authentication, and access devices
- Manage the workstation - ... it may be important to retain the contents of the system exactly as they are at the moment the previous employee was terminated or chose to leave. Thus, before decommissioning a computer as a workstation for another employee make an image of the hard drive and verify that the image is complete and accessible. You may also want to create a second form of backup onto typical backup media. ... Remember, the key is to create a copy of the data exactly so it can be used in the future to locate information, corroborate stories or provide evidence in the event a crime is detected.
- Secure printed and electronic documentation.
- Inform the security team of all employment terminations

+ More at: http://searchsecurity.techtarget.com/tip/1,289483,sid14_qci855282,00.html

Conferences:

The fifth National HIPAA Summit, October 30 - November 1, 2002 in Baltimore, MD, <http://www.HIPAAsummit.com> At a special session on Thursday morning, Oct. 31, 2002, federal and state regulators of healthcare privacy and security experts will provide regulatory updates, and respond to questions and comments. From the Dept Of Health & Human Services, the White House, the Federal Trade Commission, the National Association Of Insurance Commissioners, and from North Carolina, New York, the Southern HIPAA Administrative Regional Process (SHARP), NCHICA, Indiana HIPAA Consortium, National Association of Health Data Organizations, Massachusetts Health Data Consortium, Inc, and a group of national experts. Also, “Complying With The Hipaa Privacy & Security Workforce Training Requirement; Qualifying For The AHIMA Privacy & HIMSS Security Certifications” -- A Special Full-Day Session hosted by Train for HIPAA -- Oct. 30, 2002 -- Wednesday

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